MSS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1463 OF 2007

PADUBIDRI DAMODAR SHENOY)
R/o Flat No. 503, 'C' Wing)
Poornima Building, Vasant Utsav)
Complex, Kandivali (East))
MUMBAI 400 101) .. PETITIONER

VERSUS

1. INDIAN AIRLINES LIMITED)
having its registered and)
Head Office at Airlines)
House, 113, Gurudwara)
Rakabganj Road, New Delhi &)
the regional office at)
New Terminal Bldg., Mumbai)
Airport, Vile Parle (East))
MUMBAI 400 099)
2. THE EXECUTIVE DIRECTOR (WR))
Indian Airlines Limited, New)
Terminal Building, Mumbai)
Airport, Vile Parle (E))
MUMBAI 400 099.)

Mr. N. M. Ganguli for the petitioner

Mr. R.S. Pai with Ms. Pallavi i/b Sanjay Udeshi & Co. for R-1 & 2.

CORAM: **SMT. RANJANA DESAI &**

SMT. R. S. DALVI, JJ.

DATED ON WHICH THE JUDGMENT IS RESERVED: 07/09/2007

DATE ON WHICH THE JUDGMENT IS PRONOUNCED: 17/10/2007

JUDGMENT:-(Per Smt. Ranjana Desai, J.)

. In this petition filed under Article 226 of the Constitution of India, the petitioner has prayed that record and proceedings in the matter of Voluntary Retirement of the petitioner pursuant to the notice dated 30/9/05 issued by the respondents under Service Regulation 12(b) leading to the impugned communication dated 15/9/06 be quashed and set aside and the respondents be directed to approve the voluntary retirement of the petitioner under Regulation 12(b) of the Service Regulation pursuant to the notice dated 30/9/05 as from 30/6/06 after close of office hours.

2. It would be advantageous to begin with the gist of the facts. The petitioner joined the services of the 1st respondent as Traffic Assistant on 13/1/1977. In or about September, 2002 the

petitioner was posted to work at Muscat as Airport Manager. The respondents recalled the petitioner from foreign posting and posted him as Manager at the Mumbai Airport. The petitioner challenged the said premature recall by filing a writ petition in this court being Writ Petition No. 521 of 2003.

3. The respondents issued charge-sheet dated 16/21st January, 2003 against the petitioner on the ground of alleged misconduct. Enquiry was conducted and the Enquiry Officer held the petitioner guilty of misconduct alleged in the charge-sheet. The Enquiry Officer passed order of punishment on 31/3/06 / 10/4/06 reducing the petitioner in the time scale by two incremental stages with cumulative effect. According to the petitioner he was fed up with the alleged vindictive attitude of the superior officer and hence he decided to relinquish his service. He, therefore, withdrew Writ Petition No. 521 of 2003 on 29/11/05.

4. It appears that in 2003 respondent 1 had floated a Voluntary Retirement Scheme. The petitioner had submitted his application dated 17/9/03 opting for the voluntary retirement under

the said scheme. By letter dated 26/9/03 the respondents informed the petitioner that the said voluntary retirement scheme provided that the request for retirement under the scheme would not be accepted where disciplinary proceedings are pending / contemplated against an employee. Hence his application was not accepted by the competent authority.

5. Thereafter on 30/9/05, in accordance with the provisions of clause (b) of Regulation 12 of the Service Regulation, the petitioner gave a notice of his intention to voluntarily retire from service on the completion of three months from the date of the notice as the petitioner had completed 29 years of service. The petitioner did not receive any letter from the respondents either accepting the voluntary retirement or otherwise.

6. The petitioner sent a reminder dated 16/12/05, however, there was no response from the respondents. Since the petitioner did not receive any reply, the petitioner sent another letter dated 8/6/06 informing the respondents that he would cease to be an employee of the respondent company after close of the working hours on 30/6/06. Again

on 1/7/06 the petitioner informed the respondents that in terms of notice dated 30/9/05, the petitioner had ceased to be an employee of the respondents in terms of Regulation 12(b) of the Service Regulation and requested the respondents to release and pay all his legal dues including the provident fund and gratuity within two weeks from 1/7/06. The respondents did not respond to this letter also. Therefore, the petitioner sent another letter dated 20th July, 2006 to the respondents. He informed the respondents that if he did not receive his legal dues he would be left with no alternative but to approach the court.

7. By letter dated 31/7/06 posted on 2/8/06 the respondents for the first time responded that the petitioner's application for voluntary retirement was forwarded to the Headquarter, New Delhi for decision in the matter and the petitioner was in the meantime advised to report for duties immediately failing which disciplinary action would be taken against him. A similar letter was sent to him by the Manager, Mumbai Airport. This letter is dated 27/7/06.

8. The petitioner replied to the said letter by

his letter dated 8/8/06 reiterating his stand taken by him in his earlier letters. The petitioner stated that he ceased to be the employee of respondents from 1/7/06, in terms of Service Regulation 12(b) and, therefore, there was no question of his reporting for duties.

9. According to the petitioner, in addition to provident fund and gratuity, the petitioner is also entitled to the benefits under the Indian Airlines Employees' Contributory Superannuation Pension Scheme. The statement of claim of the petitioner is annexed to the petition at Exhibit-Q.

10. Being aggrieved by the conduct of the respondents in not accepting his application for voluntary retirement the petitioner filed Writ Petition No. 2522 of 2006. According to the petitioner after he filed the writ petition, he received a communication dated 15/9/06 from the respondents to the effect that his request for voluntary retirement has not been acceded to by the competent authority as conveyed by a letter dated 8/9/06. The petitioner by letter dated 4/10/06 called upon the respondents to furnish to him a copy of the communication dated 8/9/06 referred to

in the said letter dated 15/9/06. The respondents replied to the said letter dated 4/10/06 reiterating the contents of their letter dated 15/9/06. No other communication was sent by the respondents disclosing reasons for not accepting the request of the petitioner for voluntary retirement. By a detailed order dated 23/4/07 a Division Bench of this court (F.I. Rebello & R. M. Sawant, JJ.) disposed of the said petition. This court observed that option to accept or reject the application of voluntary retirement is with the employer, it has to be exercised within a reasonable time but if it is not exercised within a reasonable time that does not give right in an employee to contend that the employment has come to an end. This court while disposing of the petition, however, observed that it was not going into the merits as to whether respondent 1 was within its jurisdiction to accept or refuse and if the petitioner is aggrieved it is for the petitioner to take whatever action which he desires.

11. Perhaps taking support of the observation of this court that it was not going into the merits as to whether respondent 1 was within its jurisdiction

to accept or refuse petitioner's application and, if the petitioner is aggrieved, it is for him to take whatever action which he desires, the petitioner has filed this petition.

12. Before, we refer to the rival contentions, we must note that paragraphs 1 to 15 of the present petition are identical to paragraph 1 to 15 of the earlier petition. In the earlier petition the petitioner had specifically raised the contention that Service Regulation 12(b) contemplates that the competent authority must communicate its decision to the employee within three months' notice period and that after the expiry of the notice period the approval for the voluntary retirement was deemed to be given and the employee ceases to be an employee on the termination of contract of employment by efflux of time.

13. In its order dated 23/4/07, the Division Bench quoted Regulation 12 (b). The Division Bench heard arguments on this point. It is reflected in the order that this point was canvassed. The Division Bench then observed that because the employee does not exercise the right to accept or reject the application within a reasonable time that does not

give right in employee to contend that employment has come to an end. It is distressing to note that though this contention is rejected it is again raised in the present petition. It is improper for the petitioner to have a second round of litigation in this manner on the same point. We are unhappy about this conduct of the petitioner.

14. Though Mr. Ganguli has raised the same submission since the Division Bench in its order dated 23/4/07 has dealt with it, we are unable to consider it. The only grievance of Mr. Ganguli which we think, we can consider is that the respondents have not communicated reasons to the petitioner as to why his application was not granted. According to Mr. Ganguli, this has resulted in violation of principles of natural justice. He submitted that non communication of the reasons indicate that no grounds in fact exist.

15. In support of his submissions the learned counsel relied on the judgments of the Supreme Court in **A. K. Kraipak v. Union of India, AIR 1970 SC 150**, **K. T. Shepherd & Ors. v. Union of India & Ors. (1987) 4 SCC 431**, **S. N. Mukherjee v. Union of India, AIR 1990 SC 1984**, **Delhi**

Transport Corporation v. DTC Mazdoor Congress & Ors., AIR 1991 SC 101 and **Om Kumar & Ors. v. Union of India (2001) 2 SCC 386**.

16. On the other hand the learned counsel for the respondents contended that the submissions made by the learned counsel for the petitioner and raised in the petition were also raised before this court in Writ Petition No. 2522 of 2006. By a detailed order this court has rejected the said submissions. It is, therefore, not open to the petitioner to re-agitate the said issues. The learned counsel contended that the application for voluntary retirement is an offer made by an employee and unless it is accepted by the employer it does not become effective. The employee is not relieved from service till the offer is accepted because the relationship of employer and employee does not come to an end. He submitted that in this case the offer of the petitioner was not accepted by the 1st respondent. Delayed communication does not create any right in the petitioner. He submitted that the Regulations do not contemplate that any reasons have to be communicated to the employee. This submission, therefore, must be rejected.

17. In support of his submissions, the learned counsel relied on (1) **(1997) 4 S C C 280, Power Finance Corporation Ltd. v. Pramod Kumar Bhatia** (2) **(2006) 7 S C C 410, General Manager, Appellate Authority, Bank of India & Anr. v. Mohd. Nizamuddin** and (3) **(2006) 7 S C C 664, Board of Trustees, Vishakhapatnam Port Trust & Ors. v. T.S.N. Raju & Anr.**

18. The concept of voluntary retirement was considered by the Supreme Court in **Power Finance Corporation's case (supra)**. The Supreme Court observed that, it is well settled legal position that unless the employee is relieved of the duty after acceptance of the offer of voluntary retirement or resignation jural relationship of the employer and the employee does not come to an end. In that case the order accepting the voluntary retirement was conditional. Before the conditions could be complied with, the employer withdrew the scheme. The Supreme Court observed that consequently the order accepting voluntary retirement did n ot become effective. The Supreme Court observed that the High Court, therefore, was

not right in holding that the respondent has acquired a vested right and therefore, the appellant has no right to withdraw the scheme subsequently because no vested right was created in favour of the respondent.

19. In **Bank of India and Ors. v. O. P. Swarnakar & Ors. (2003) 2 SCC 721**, the Supreme Court referred to **Power Finance Corporation's case** and reaffirmed the same view. Same principles were reiterated by the Supreme Court in **HEC Voluntary Retd. Employees Welfare Society & Anr. v. Heavy Engineering Corporation & Ors., (2006) 3 SCC 708**. Again in **Board of Trustees, Vishakhapatnam's case (supra)**, the Supreme Court observed that Voluntary Retirement Scheme was not a proposal or an offer but merely an invitation to treat and the applications filed by the employees constituted an offer and the request of the employees seeking voluntary retirement was not to take effect until and unless it was accepted in writing by the employer (Port Trust Authorities in the facts of that case) who had an absolute discretion whether to accept or reject the request of the employee seeking voluntary retirement under the scheme.

20. In this case the application was made under Regulation 12(b) which contemplates a provision for voluntary retirement. But the principles laid down by the Supreme Court will be equally applicable to it. There is nothing to indicate in the Regulation that the employee has a vested right once he makes an application. Till it is accepted there is no concluded contract. The employer in his discretion could refuse to accept an application for voluntary retirement. That is exactly what has been done here. The fact that the application was not accepted has been communicated to the petitioner. He was told that his request has not been acceded by the competent authority. Therefore, there is sufficient compliance of the principles of natural justice.

21. We must, however, refer to the judgments on which Mr. Ganguli has placed reliance.

22. In **Omkumar's case (supra)** the Supreme Court was concerned with the proceedings arising out of an order passed by it proposing to re-open the quantum of punishment imposed in departmental enquiries on certain officers of Delhi Development Authority. The Supreme Court observed that where

an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority.

23. In **K. I. Shepherd's case (supra)** the Supreme Court was concerned with scheme of amalgamation of banking company. Some of the employees of amalgamated bank were excluded from the service of the transferee bank. The Supreme Court held that exclusion of employees without complying with natural justice rules was bad in law. They were not given notice nor were they heard. It was held that in cases of action which brings adverse civil consequences to people such as loss of livelihood fairplay an action is required.

24. In **S. N. Mukherjee's case (supra)** the validity of the findings and sentence recorded by the General Court Martial and order passed by the Chief of Army staff confirming the findings and sentence recorded by the General Court Martial were under challenge. The Supreme Court observed that reasons are not required to be recorded for an order passed by the confirming authority. However,

it is open to the person aggrieved by such an order to challenge the validity of the same before the Supreme Court under Article 32 of the Constitution and before the High Court under Article 226 of the Constitution. Recognising the right of a person to challenge the order, the Supreme Court further observed that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi judicial functions is required to record reasons for its decision.

25. **Kraipak's case (supra)** pertains to challenge to the selections made from the officers serving in the forest department of the State of Jammu & Kashmir to the Indian Forest Services. Action of administrative authority i.e. Selection Board was under challenge. One member of the board was himself a candidate for selection. The Supreme Court observed that the dividing line between an administrative power and quasi-judicial power is quite thin and set aside the selections on the ground of reasonable likelihood of bias.

26. In **D.K. Yadav's case (supra)** the Supreme Court was concerned with termination of services of

an employee. In **Delhi Transport Corporation's case (supra)** the Supreme Court was dealing with removal of a person from service without holding enquiry and without assigning any reasons.

27. There can hardly be any doubt about the proposition laid down by the Supreme Court in **S. N. Mukherjee's case (supra)** and reiterated in several judgments that in view of the expanding horizon of the principles of natural justice, the requirement to record reasons can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. However, the judgments cited by Mr. Ganguli pertain to totally different fact situations and will have no application to the present case.

28. Proviso to Rule 12(6) states that voluntary retirement under clause (b) shall be subject to approval of the competent authority. Therefore, approval of competent authority is a condition precedent for acceptance of the application. In the communication dated 15/9/06, the petitioner has been informed that his application was forwarded to the competent authority and competent authority has

informed vide letter dated 8/9/06 that the petitioners request for voluntary retirement has not been acceded to. The petitioner has, therefore, been communicated the reasons.

29. But assuming reasons are not communicated that will not vitiate the competent authority's action. In this connection, it is necessary to refer to the judgment of the Supreme Court in **Union of India & Ors. v. E. G. Nambudri, AIR 1991 SC 1216**. In that case the Supreme Court was dealing with the order of the Central Administrative Tribunal, Delhi. The respondent was a Section Officer in the Ministry of Commerce. The respondent made representation against the adverse remark communicated to him. It was rejected. The entire field in this regard was regulated by administrative directions which did not require recording of reasons. The respondent challenged the rejection on the ground that it did not contain reasons. The Tribunal upheld its rejection. Appeal was carried from the said order to the Supreme Court. The Supreme Court referred to its judgment in **A. K. Kraipak's case (supra)** and observed that there is no doubt that the principles of natural justice are applicable even to

administrative enquiries. In paragraph 8 of the judgment, the Supreme Court considered whether principles of natural justice required an administrative authority to record reasons. The Supreme Court observed that application of principles of natural justice and its sweep depend upon the nature of the rights involved having regard to the setting and context of the statutory provisions. The Supreme Court observed that where a vested right is adversely affected by an administrative order, or where civil consequences ensue, principles of natural justice apply even if the statutory provisions do not make any express provision for the same. The Supreme Court further observed that in the absence of any statutory rule or statutory instructions requiring the competent authority to record reasons the competent authority is under no obligation to record reasons and no exception can be taken to the order rejecting representation merely on the ground of absence of reasons. The Supreme Court further observed that if the order as communicated to the Government servant rejecting the representation does not contain any reasons, the order cannot be held to be bad in law.

30. In our opinion, the ratio of this judgment is clearly applicable to the facts of the present case. Examined in the light of the judgment of the Supreme Couert in **Power Finance Corporation's case (supra)** the petitioner has no vested right. Therefore, even if it is assumed that no reasons were communicated to him, in the light of the judgment in **Union of India & Ors. v. E. G. Nambudri**'s case (supra), the action of the competent authority cannot be faulted on the ground that he was not communicated the reasons.

31. We are, therefore, of the considered opinion that there is no violation of principles of natural justice.

32. In our opinion, there is no merit in the petition. The petition is, therefore, rejected.

JUDGE.

JUDGE.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1463 OF 2007

DATE ON WHICH THE JUDGMENT IS RESERVED: 7TH SEPTEMBER, 2007

DATE ON WHICH THE JUDGMENT IS PRONOUNCED:___TH OCTOBER,2007

Transcription of JUDGMENT

THE HON'BLE (SMT.) JUSTICE RANJANA DESAI:

THE HON'BLE (SMT.) JUSTICE R. S. DALVI:

1. Whether Reporters of Local Papers be allowed to see the Judgment?)
2. To be referred to the Reporters or not?)